

State of Vermont
WATER RESOURCES BOARD

In re: Mountain Valley Marketing (MVM)
Docket Nos. 91-06 and 91-09

**MEMORANDUM OF DECISION AND
DISMISSAL ORDER**

This decision pertains to the above-captioned consolidated appeals filed by Mountain Valley Marketing/SIMCO (appellant) requesting, among other things, that it be reimbursed by the Agency of Natural Resources (ANR) for the cost of legal fees from the Petroleum Cleanup Fund (PCF) (10 V.S.A. § 1941). For the reasons stated below, the appellant's request for reimbursement is denied and its consolidated appeal is dismissed.

I. **BACKGROUND**

On May 17 and July 25, -1991, the Water Resources Board (Board) received notices of appeal filed by the appellant from decisions issued by the Hazardous Materials Management Division (HMMD) of the ANR denying the appellant's requests for reimbursement from the Petroleum Cleanup Fund (PCF) for certain costs allegedly incurred by the appellant as a result of site assessment activities related to a suspected release from old underground storage tanks (USTs) at the Waitsfield Gulf Station, in Waitsfield, Vermont. Included in the appellant's request was \$46,100.65 in attorney's fees.

On October 8, 1991, Chair Rocheleau issued a prehearing conference order consolidating the two appeals and identifying five legal issues to be addressed by the Board. On November 1, 1991, the ANR filed a Motion to Dismiss. On March 16, 1992, the Board (Rocheleau, Lash, Little and Reynes) issued an order dismissing all but one of the appellant's claims. The Board determined that the sole issue remaining for its consideration was "whether legal fees incurred directly and solely as a result of site assessment activities related to the suspected release from the old USTs (Underground Storage Tanks) are legally reimbursable pursuant to 10 V.S.A. § 1941(b)(1)." In re: Mountain Valley Marketing, Inc., Docket No. 91-06; 92-09, Preliminary Order at 5-6 (March 16, 1992).

On May 22, 1992, the appellant filed a Motion for Enlargement of Issues. On August 18, 1992, the Board (Rocheleau, Little and Reynes) denied the appellant's motion, thereby leaving for its determination the one issue identified in its order of March 16, 1992. In re: Mountain Valley Marketing, Inc., Docket NO. 91-06;

Memorandum of Decision and Dismissal Order
In re: Mountain Valley Marketing (MVM)
Docket Nos. 91-06 and 91-09
page 2 of 5.

91-09, Preliminary Order (August 18, 1992).¹

On December 29, 1992, and again on February 18, 1993, the Board through its staff wrote to the parties requesting an update on the status of these appeals and proposing that this matter be scheduled for briefing and oral argument before the Board. On March 12, 1993, the appellant filed a memorandum in support of its claim for attorney's fees. On March 23, 1993, the ANR filed a memorandum in opposition to appellant's request and in support of dismissal.

Oral argument was held on March 29, 1993, in Montpelier, Vermont. Representing the appellant was William Simendinger, Esq.; representing the ANR was Ginny McGrath, Esq. Board members participating were Chair Rocheleau, DesMeules, Little and Reynes. At oral argument, in response to disclosures, the parties indicated for the record that they did not object to the participation of Chair Rocheleau in this matter.

The Board deliberated on June 1, 1993. On a motion by Reynes, seconded by Little, those Board members participating voted unanimously to dismiss this appeal and to issue a decision setting forth the reasons for dismissal. This memorandum of decision and order memorializes the Board's action and rationale.

II. ISSUE

Whether legal fees incurred directly and solely as a result of site assessment activities related to the suspected release from the old USTs are legally reimbursable pursuant to, 10 V.S.A. § 1941(b)(1).²

¹ The appellant's Motion for Enlargement of Issues asked the Board to determine "whether Mountain Valley Marketing is entitled to recover attorney fees as a third party claimant." The Board denied the appellant's request because: (1) this issue was not raised in the appellant's two notices of appeal; (2) the Board, as an appellate body with de novo powers, lacks jurisdiction to decide questions that have not been first determined by the DEC.

² In its Memorandum in Support of MVM's Claim for Attorneys' Fees [and] -Memorandum in Opposition to Motion to Dismiss at 2-3 (March 12, 1993), the appellant identifies two separate but related issues for the Board's consideration. These were consolidated for the purpose of argument and decision. See Preliminary Order at 5-6 (March 16, 1992).

Memorandum of Decision and Dismissal Order

In re: Mountain Valley Marketing (MVM)

Docket Nos. 91-06 and 91-09

page 3 of 5

III. DISCUSSION

The appellant has requested reimbursement for \$46,100.65 in attorney's fees. The appellant asserts that these fees were incurred as a result of site assessment activities related to the suspected release from the old USTs at the Waitsfield Gulf Station site. The appellant argues that such fees are reimbursable under various legal theories including equity, contract law, and specific statutory authority.

The Board has reviewed -the record in this, proceeding and appellant's representations in its Memorandum in Support of MVM's Claim for Attorneys' Fees in opposition to Motion to Dismiss, filed March 12, 1993 (MVM Memorandum). The Board concludes that no statutory authority or other theory of law cited by the appellant supports its claim that the requested, attorney's fees can and should be reimbursed from the PCF.

Title 10 V.S.A. § 1941(b) authorizes the Secretary of ANR to make disbursements from the PCF for the cleanup and restoration of contaminated soil and groundwater caused by releases of petroleum from underground storage tanks, including air emissions for remedial actions, and for compensation of third parties for injury and damage caused by a release. Subsection 1941(b)(1) authorizes the Secretary to make disbursements from the PCF to "cover costs incurred by taking corrective action as directed by the Secretary for the release of petroleum into the environment from a site...."

The term "costs" is not defined in 10 V.S.A. § 1941 or elsewhere in 10 V.S.A. ch. 59. The reimbursement of attorney's fees from the PCF is not expressly provided for in 10 V.S.A. ch. 59. Therefore, the Secretary or the Secretary's representative must assess whether bills submitted to the ANR for reimbursement reflect costs actually incurred in taking corrective action as directed by the Secretary for a petroleum release from the owner's site.

The facts adduced from the record in this proceeding and appellant's representations in its memorandum support the conclusion that the attorney fees for which it seeks reimbursement were not incurred "in taking corrective action as directed by the Secretary" for a petroleum release at MVM's site. Rather, as the appellant has stated, the attorney fees were incurred from

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Memorandum of Decision and Dismissal Order
In **re:** Mountain Valley Marketing (MVM)
Docket Nos. 91-06 and 91-09
page 4 of 5

litigation or preparation for litigation in defense **against** various ANR administrative orders. See MVM Memorandum at 9 (March 12, 1993) ("The largest, cost ... was the attorneys's fees from litigation with the ANR."); MVM Memorandum at 10 ("The task of helping the appropriate tribunal to understand the degree and extent of contamination and to issue an appropriate order on remedial efforts required attorneys' work.")

Attorney's fees incurred in the defense of an **enforcement** action brought by the ANR is not a cost reimbursable pursuant to 10 V.S.A. § 1941(b)(1) since these costs are unrelated to the taking of corrective action. "Corrective action" means environmental remediation not protection of the corporate client from "potential liability over many years." See MVM Memorandum at 17. Likewise, site assessment activities, and attendant **attorney's** fees, performed prior to issuance of the ANR orders are not eligible for reimbursement pursuant to 10 V.S.A. § 1941(b)(1), **because they** do not constitute corrective action as directed by the Secretary designed to remediate a petroleum release.

The general rule in Vermont is that "attorney fees are considered litigation expenses -- not costs -- and are not as freely taxed to the opposing party by one who prevails in a particular matter.." In re Appeal of Gadue, 149 Vt. 322, 327 (1988). Indeed, attorney's fees are not generally awarded absent statutory authority or as a matter of contract. Id.

As noted above, there is no statutory authority granting either the ANR, or the Board on appeal; the power to reimburse legal fees from the PCF. The form letter issued in May 1990 by then Commissioner Burke did not and could not expand coverage beyond the provisions of 10 V.S.A. ch. 59 to include **attorney's** fees as part of "uninsured corrective action costs," and certainly did not create an "insurance contract" between MVM and the State as the appellant claims. See MVM Memorandum at 15. Moreover, the appellant has not directed the Board to any legal authority providing the ANR or the Board with equitable powers to award attorney's fees consistent with the exception to the American Rule enunciated in In re Anneal of Gadue, 149 Vt. at 327.³

³ Appellant refers the Board to a case, but provides no citation, in which the ANR allegedly awarded attorney's fees to the Village of Waterbury in an action to recover cleanup costs from an insurer. This case does not answer the question whether the ANR has authority to reimburse the requested attorney's fees pursuant to 10 V.S.A. §1941(b)(1).

Finally, to the extent that the appellant now characterizes itself as a third party claimant eligible for reimbursement of its attorney's fees, the Board observes that the appellant has failed to exhaust its administrative remedies. As the Board noted on a previous occasion, the DEC as the Secretary's representative has original jurisdiction to determine whether specific legal fees can be covered as part of a third party claim. In re: Mountain Valley Marketing, Inc., Docket No. 91-06; 91-09, Preliminary Order at 2 (August 18, 1992). To the best of the Board's knowledge, the appellant has not pursued a third party claim before the ANR, and it did not raise this theory in its notice of appeal. Therefore, the Board has no authority to consider whether the appellant's attorney's fees are reimbursable pursuant to 10 V.S.A. § 1941(b)(2).

For the foregoing reasons, the Board concludes that the appellant's legal fees are not reimbursable from the PCF.

IV. **ORDER**

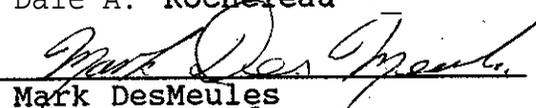
There being no other issues pending before the Board, it is hereby ordered:

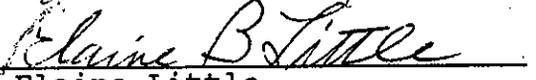
1. The appellant's request for legal fees is denied; and
2. The above-captioned consolidated appeal is dismissed.

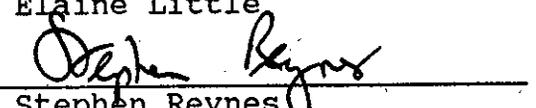
Dated at Montpelier, Vermont, this 7th day of October, 1994.

Vermont Water Resources Board

Dale A. Rocheleau *


Mark DesMeules


Elaine Little


Stephen Reynes

* Recused as of 9/15/94